2001

Rhonda Merryweather v. Carson R. Callister : Brief of Appellee

Utah Court of Appeals

Ryan Harris; Jones, Waldo, Holbrook and McDonough; Lynn Harris; Harris and Carter; Attorneys for Plaintiff/Appellee.
R. Phil Ivie; David N. Mortensen; Ivie and Young; Attorneys for Defendant/Appellant.

IN THE UTAH COURT OF APPEALS

RHONDA MERRYWEATHER,	:	
	:	
Plaintiff/Appellee,	:	Case No. 20010431-CA
	:	
vs.	:	District Court Case No. 980100391
	:	
CARSON R. CALLISTER,	:	Priority 15
	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE
(ORAL ARGUMENT REQUESTED)

APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT IN AND FOR BOX ELDER COUNTY, STATE OF UTAH, HONORABLE BEN H. HADFIELD

R. Phil Ivie
David N. Mortensen
IVIE & YOUNG
226 West 2230 North, Suite 120
Provo, Utah 84606

Attorneys for Defendant/Appellant

Lynn C. Harris (USB #1382)
HARRIS & CARTER
3325 North University Avenue, Suite 200
Provo, Utah 84604

Ryan M. Harris (USB #8192)
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101

Attorneys for Plaintiff/Appellee

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j), because this appeal has been transferred to this Court from the Utah Supreme Court, pursuant to Utah Code Ann. § 78-2-2(4), by order dated June 14, 2001. R. at 1188.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues presented on appeal are as follows:

a. Whether the district court abused its discretion by allowing the five-minute rebuttal testimony of Mr. Cottle, and whether the district court abused its discretion by denying Defendant's motion for a new trial on this issue?

b. Whether the district court abused its discretion in the manner in which it handled the issue of Defendant's whereabouts?

c. Whether the court abused its discretion by excusing Juror Tams for cause?

d. Whether the district court abused its discretion in admitting the expert testimony of Dr. David Rollins?

e. Whether the district court abused its discretion in allowing Mr. Jex to testify regarding Merryweather's September 2000 demotion, and whether the district court abused its discretion in denying Defendant's motion for a new trial on this issue?

f. Whether the district court abused its discretion in allowing (largely without objection) certain statements by counsel that Defendant now claims are "prejudicial," whether the district court abused its discretion by denying Defendant's motion for a mistrial based on one of these alleged "prejudicial" statements, and whether the district court abused its discretion by denying Defendant's motion for a new trial on this issue?

g. Whether, if the district court committed error, any such error was harmless?

This Court reviews ***all*** of these issues for an abuse of discretion. Several of these issues (a, e, and f) arose in the context of Defendant's motion for new trial; "[o]rders granting or denying motions for a new trial will not be reversed . . . unless there has been a manifest abuse of discretion." See Schmidt v. Intermountain Health Care, Inc., 635 P.2d 99, 101

(Utah 1981). Several of these issues (a, b, d, and e) involve the district court's decisions to admit or exclude evidence; "the trial court's decision to admit or exclude evidence will not be reversed absent an abuse of discretion." See Meyers v. Salt Lake City Corp., 747 P.2d 1058, 1060 (Utah Ct. App. 1987); see also Ostler v. Albina Transfer Co., Inc., 781 P.2d 445, 447 (Utah Ct. App. 1989) (stating that a trial court's decision to admit or exclude *expert* testimony "will not be overturned in the absence of an abuse of discretion"). One of these issues (issue c) involves the district court's decision to excuse a potential juror for cause; "a trial court's determination of whether to excuse a prospective juror for cause should not be reversed absent an abuse of discretion." See State v. Wach, 2001 UT 35, ¶25, 24 P.3d 948. One of these issues (issue f) involves the district court's decision to deny Defendant's motion for a mistrial; "[a] trial court's denial of a motion for mistrial will not be reversed absent an abuse of discretion" because "the trial court is in the best position to determine whether the incident prejudiced the jury." See State v. Widdison, 2001 UT 60, ¶45, 28 P.3d 1278. Even Defendant agrees that all of these issues are to be reviewed for abuse of discretion. See Aplt's Br., at 1-3.

Defendant neglects to mention, however, that several of the issues he raises on appeal were not properly preserved, through objection, during the trial. See infra pages 10, 23 n.13, 24 n.14, 32, 42-48. Where a party does not object to the admission of evidence, an appellate court may review the trial court's decision to admit the evidence, but only under the "plain error" standard. See Utah R. Evid. 103(d). "In order for an error to be 'plain,' an appellate court must find that it should have been obvious to the trial court that it was committing error." See State v. Elm, 808 P.2d 1097, 1100 (Utah 1991).

Finally, Defendant also fails to mention that, even if the trial court did somehow

abuse its discretion in the admission or exclusion of evidence, such an error is not reversible "unless a substantial right of the party is affected." Utah R. Evid. 103(a); see Jones v. Cyprus Plateau Min. Corp., 944 P.2d 357, 360 (Utah 1997) (stating that "an erroneous decision to admit or exclude evidence does not constitute reversible error unless the error is harmful"). An error is "harmful" when "the likelihood of a different outcome in the absence of the error is sufficiently high so as to undermine confidence in the verdict." Id. In this case, even if the district court committed error in its evidentiary rulings (which it did not), any such error was harmless—there is nothing to suggest that the jury's verdict would have been any different had more of the evidentiary rulings gone Defendant's way.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Utah Code Ann. § 78-24-1 is applicable to one of the issues in this appeal, and is set forth, in relevant part, at page 21. Merryweather is unaware of any other constitutional provisions, statutes, ordinances, rules or regulations that are determinative in this case.

STATEMENT OF THE CASE

The complaint in this case was filed in First District Court in Brigham City on June 8, 1998. See R. at 1. An Amended Complaint was filed ten days later. Id. at 6. The Complaint arose out of an automobile accident that occurred on February 28, 1997, wherein Defendant rear-ended Merryweather's vehicle, causing severe injuries to Merryweather. Id. at 6-8. After the completion of discovery, the case went to trial before Judge Ben H. Hadfield on September 20, 2000. See id. at 840 (trial transcript).[1] The trial lasted for eight days, and concluded on October 3, 2000. Vol. 8. That day, after several

[1] The first page of the trial transcript is marked as page 840 of the court record. Herein, however, transcript pages will be cited by volume and page number (e.g., Vol. 2, at 10).

hours of deliberation, the jury returned a verdict for Merryweather, awarding $1,300,568 in damages. R. at 705-06. On October 20, 2000, the verdict was entered as a judgment. Id. at 711-12. On November 2, 2000, Defendant filed a Motion for New Trial. Id. at 716. On December 27, 2000, after the Motion for New Trial had been fully briefed, the district court ordered supplemental briefing on certain issues related to the motion. Id. at 837. On March 7, 2001, after receiving the supplemental briefs and after hearing oral argument, the district court, after a diligent "search[]" for grounds to grant the motion, concluded that there were none, and denied the motion. Id. at 1138. On March 27, 2001, the district court signed an order denying the motion for new trial. Id. at 1140-41. On April 17, 2001, Defendant filed his Notice of Appeal. Id. at 1154.

STATEMENT OF THE FACTS

A. Summary of Merryweather's Case-in-Chief, and the Evidence Presented at Trial

At the time of the accident (February 1997), Rhonda Merryweather was a 35-year-old wife and mother of three, and was employed as a registered nurse on staff at the Bear River Valley Hospital ("BRVH") in Tremonton, Utah. At that point in her life, she was in excellent health—she had just delivered a son in 1996, was fully functional at home and at work, and regularly participated in various recreational activities, including regular strenuous exercise. All of this changed on February 28, 1997 as she was driving home.

Defendant was home in Tremonton from Snow College to visit family and friends on February 28, 1997. That afternoon, he was driving a Honda. See Vol. 2, at 9. Defendant testified that, at the time of the accident, he was traveling 20-25 mph in a 40-mph speed zone. Id. at 18. At this point, Defendant looked down to the seat next to him at a piece of paper. Id. at 25. As he looked up, he saw that Merryweather's Ford

Explorer was only 2-3 car lengths directly in front of him. Id. at 24. She was stopped in traffic waiting for a truck to turn left. Defendant does not have a memory of being able to brake or slow or steer his vehicle prior to impact. Id. at 20, 28. Defendant's Honda struck Merryweather's Explorer from the rear, and nose-dived under the SUV—the two vehicles remained stuck together following the crash. Id. at 30. The SUV had to be physically lifted off of the Honda by the wrecking truck. Id. at 40, 57, 66. After impact, the SUV was pushed forward 15-20 feet, and was pushed partially into the opposite lane of traffic. Vol. 3, at 39, 41-42. Rudolph Limpert, Ph.D. ("Dr. Limpert"), a mechanical engineer who reconstructed the facts of the collision, testified that Defendant's vehicle was traveling approximately 30 mph, did not slow prior to collision, and basically agreed with the version of the collision as testified to by Defendant. Id. at 66-67. He also testified to the significant speed and forces on Merryweather's body and neck. Id. at 74.

At the scene of the accident, Merryweather told the investigating officer, as well as Defendant and his parents, that she was injured. Vol. 2, at 79; Vol. 6, at 32-33. Immediately after the accident, her husband took her to see their family physician, Chad Merrell, M.D. ("Dr. Merrell"), at the local clinic adjacent to BRVH. Vol. 2, at 81-82; Vol. 6, at 33-34. She was diagnosed with a neck injury and referred to physical therapy. Vol. 2, at 82-83; Vol. 4, at 198-203; Vol. 6, at 34. During the time between the accident and October 17, 1997, Merryweather received medical care and treatment from Dr. Merrell, Jay Cottle, RPT ("Mr. Cottle"), and Teresa Frandsen ("Ms. Frandsen"), a physical therapy aide at BRVH. Vol. 2, at 89. Some of the visits to these medical professionals were formal and documented; however, many of the visits were informal "curbside" visits between co-medical workers and were undocumented. E.g., id. at 149,

160, 163. Each of the medical witnesses testified that all of the formal and informal visits and treatments did in fact take place. For instance, Ms. Frandsen testified that there were as many as 10 physical therapy treatments in this time frame. Id. at 185.

On October 17, 1997, Merryweather awoke with excruciating pain, which was treated at home and at the clinic. Id. at 95-96. On October 22, 1997, Merryweather was admitted to BRVH, and, subsequently, transferred to McKay-Dee Hospital in Ogden, where she came under the care of Bryson Smith, M.D. ("Dr. Smith"), a neurosurgeon. Id. at 105-06; Vol. 4, at 145, 153. Following treatment in Ogden, she was ultimately referred to the Pain Clinic at the University of Utah Medical Center in Salt Lake City, and came under the direct care of Michael Ashburn, M.D. ("Dr. Ashburn"), an anesthesiologist specializing in pain management. See Vol. 4, at 6, 46. At the time of trial, Merryweather was under the continuing care of Dr. Ashburn and the Pain Clinic staff. Id. at 46.

At trial, Merryweather presented testimony from each of these medical care providers and physicians. Each of the physicians testified, based upon reasonable medical probabilities, that Merryweather's initial injury and its progression over time were caused by the collision. Vol. 4, at 79 (Dr. Ashburn); id. at 172 (Dr. Smith); id. at 217 (Dr. Merrell).

Merryweather presented evidence supporting her claim for future special damages using a combination of three expert witnesses. Dr. Ashburn first testified concerning the opinions he gave to David Rollins, Ph.D. ("Dr. Rollins"), a life care planner and vocational rehabilitationist. Using Dr. Rollins' report (which he helped prepare), Dr. Ashburn testified as to each of the report's specific categories of necessary future medical and non-medical care and treatment. Vol. 4, at 84-91, 94-98. In each instance, Dr. Ashburn (the medical doctor) testified that each category and each item was necessary based upon

reasonable medical probabilities. Id. Dr. Ashburn also testified that the wage loss portion of Dr. Rollins' report was also based upon reasonable medical probabilities. Id. at 94-98. This testimony from Dr. Ashburn came into evidence without objection from Defendant.

Following Dr. Ashburn, Dr. Rollins testified to the same opinions as had Dr. Ashburn; all of his testimony was based upon reasonable rehabilitative probabilities. Vol. 5, at 100-01. Dr. Rollins is board certified in three separate areas of forensic medical/legal areas, id. at 77, and has been qualified to testify in numerous courts in Utah and many other states, id. at 77-78. He testified that he had met with Merryweather and with Dr. Ashburn, and, in addition, had visited BRVH and had met with Merryweather's supervisor concerning her ongoing employment. Id. at 82-86. Dr. Rollins placed year 1999 dollar amounts on each of the items outlined in his report and testified to by Dr. Ashburn. Id. at 98.

Finally, Merryweather presented the testimony and expert economic opinions of Paul Randle, Ph.D. ("Dr. Randle"). Dr. Randle had followed accepted economic principles and legal requirements in reducing all damages, including the future special damages, to their present value. Id. at 200. Dr. Randle's opinions reflected future medical damages and past and future lost wage damages in excess of $1,200,000. The jury ultimately awarded $968,568 in special damages and $332,000 in general damages, for a total verdict of $1,300,568—significantly less than what Merryweather requested in closing argument.

After reviewing the evidence presented at trial in connection with Defendant's post-trial motion, the district court stated that "[d]espite repeated efforts to find a good reason to grant a new trial, the court in every instance comes back to the fundamental issue: ***there was evidence presented to the jury that supports the verdict.***" R. at 1137 (emph. added).

B. Pre-Trial Motions and Developments

1. Merryweather's motion in limine.

In advance of trial, Merryweather filed several pretrial motions in limine, one of which merits mention here. On August 7, 2000, Merryweather filed a motion in limine to exclude any expert testimony at variance with the expert testimony offered in the respective defense experts' depositions. Id. at 271. During the discovery process, it became clear that defense counsel had decided not to provide certain materials to Defendant's two liability and two medical experts. Specifically, defense counsel did not provide *any* of the depositions to *any* of the experts, and had only provided selected portions of the treating physicians' medical records to Defendant's medical experts.[2]

The district court, after briefing and argument, granted Merryweather's motion in limine. Id. at 1175 (transcript of Sept. 7, 2000 hearing), at 15-26. The trial court specifically ruled that each of the defense experts would be allowed to testify, but only to the opinions and issues found in the depositions, and that the defense experts would only be allowed to rely on the materials provided to them at the time of their deposition.

Defendant does not challenge the court's ruling on the motion in limine; it is mentioned here only because the issues are germane to some of the issues in this appeal.

2. The dispute about Defendant's whereabouts and unavailability.

The fact that Defendant was not going to be present at trial was initially discussed

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[2] For instance, defense counsel elected not to provide Paul France, Ph.D. ("Dr. France"), a collison reconstruction expert, with Defendant's deposition, and hence Dr. France had not heard Defendant's version of speed, distance or braking. Vol. 7, at 140. Moreover, defense counsel elected not to provide Defendant's medical experts with any depositions of the health care providers (Dr. Ashburn, Dr. Smith, Dr. Merrell, Mr. Cottle) who testified concerning the formal and informal medical treatments given to Merryweather.

during the September 7 hearing on the motion in limine. At that hearing, Merryweather's counsel asked if Defendant would be present at trial and, if not, how the district court intended to deal with the issue of his LDS mission. Id. at 68. The Court noted that it was possibly prejudicial to tell the jury that Defendant was serving a mission, because "while they are on their mission they sort of achieve sainthood." Id. at 68, 70.

Defense counsel requested that he be able to tell the jury of Defendant's whereabouts "so they don't think he's in jail." Id. at 69. Later in the same hearing, the Court made a ruling that the jury will be told that "the defendant is overseas. He's presently unavailable. And both sides have agreed to use his deposition rather than to wait until he returns." Id. at 89. The court also noted that "[i]f either of you wanted to wait until he returns you would have objected to this trial setting." Id. at 89. The court reiterated that "both sides have agreed to use his deposition and to go forward with the trial rather than wait for him to return." Id. at 90-91. Defense counsel responded: "Okay." Id. at 91.

Three weeks later, on the first day of trial, these issues came up during the jury selection process. The court restated its ruling of September 7, and noted that the ruling was given with defense counsel present, and although defense counsel had lodged an objection to the court's decision not to tell the jury that Defendant was on a mission, there had been no objection to the trial setting and no continuance had been requested. Vol. 1, at 30-31. Despite this, defense counsel made a motion for a continuance on the first day of trial, which motion was denied. Id. at 32. Later that day, after the jury had been impaneled, the court did inform the jury as to Defendant's whereabouts in a manner consistent with his ruling, and instructed the jury that Defendant's whereabouts would therefore not be an issue. Id. at 56-57 (Defendant "is overseas" and "presently not available").

Later in the trial, before closing arguments, defense counsel again raised this issue. See R. at 841 (transcript of October 2, 2000 hearing), at 20-26. At the conclusion of the discussion, the court decided to relax its prior ruling, and allow defense counsel to state, one time, that Defendant is "serving his church in Brazil." Id. at 23. Following the court's ruling, and in his initial closing argument to the jury, defense counsel stated:

> I didn't want you to think that he's a fugitive from justice or in a Turkish prison somewhere. Quite simply, Carson is serving his church overseas in Brazil and doesn't come back until later this year. That's the only reason he's not here at trial . . . . Now, we were prepared to proceed without him because his presence really wasn't necessary.

Vol. 8, at 44.

Before closing argument, the district court also granted Merryweather's request to comment on the connection between (a) Defendant's absence from the trial and (b) the fact that Defendant's version of the collision, as read to the jury through his deposition, was flatly contradicted by the defense's two accident reconstruction experts. See R. at 841 (transcript of October 2, 2000 hearing), at 5-26.[3] At the time of this ruling, defense counsel did not make an objection.[4] Based on this ruling, Merryweather's counsel began his closing rebuttal argument by pointing out that "there's a reason why [defense counsel] chose to try this case with his client overseas," and suggesting that this reason had

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[3] At trial, Newell Knight, one of Defendant's accident reconstruction experts, testified that it was "absolutely" true that his testimony was "inconsistent" with Defendant's testimony, and confirmed that, at his deposition, he testified that Defendant was "absolutely wrong" about the collision. Vol. 6, at 192. In opening statement, defense counsel characterized this collision as a "low speed rear end accident." Vol. 1, at 180. Indeed, in his brief, Defendant continues to maintain, contrary to Defendant's own testimony, that "the case presented a low speed accident." See Aplt's Br., at 4.

[4] See footnote 13, infra.

everything to do with the disagreement between Defendant, on the one hand, and his counsel and experts, on the other hand, with respect to the speed and the events of the collision. Vol. 8, at 84. Once again, defense counsel did not make any objection at the time of the discussion of the above noted association.

3. Merryweather's employment status.

In the months leading up to the trial, Merryweather's employment status changed ***twice***. The distinction between these two changes in her employment status is critical.

Following the collision in February 1997, Merryweather continued to work full time as a staff nurse until October 1997, and following the multiple hospitalizations of October and November 1997, Merryweather did not begin to return to work until the spring of 1998. Vol. 5, at 173-81. At trial, both Merryweather and Robert Jex ("Mr. Jex"),[5] the hospital administrator, outlined Merryweather's employment at IHC following the October 1997 hospitalization. Id. at 25-59; Vol. 6, at 15-17, 54.

Due to physical limitations, Merryweather was not allowed to return to her previous job as a staff/floor nurse, but was given more ministerial, paperwork-style functions to perform. Vol. 5, at 36-37. She held this new administrative and ministerial position for approximately one year, from March 1998 to March 1999. Id. at 39-43. At Merryweather's depositions, which occurred on October 14 and November 12, 1998, defense counsel thoroughly explored the issues relating to Merryweather's inability to continue at her former job and her reassignment to an administrative job. See R. at 913-22.

In March 1999, Merryweather was promoted to an administrative position as the

[5] The pleadings filed in this case reveal that Defendant, as well as Merryweather, designated Jex as a potential witness. Despite this fact, Defendant never took the opportunity to depose Jex (or any other supervisor or employment-related witness).

#3 administrator at BRVH. Her promotion took place *after* her two depositions were taken in the fall of 1998. Vol. 5, at 39-43.

Change #1. In late 1999, however, Merryweather's supervisors began to notice that her job performance in this new administrative job was unsatisfactory. In November 1999, Mr. Jex brought Merryweather in to discuss poor job performance in her new administrative position. After November 1999, he and the #2 administrator met with Merryweather every 3 or 4 months to discuss her poor job performance and her struggle to perform her administrative tasks. Id. at 43-44. Finally, in the summer of 2000, and at the request and direction of her physicians, Merryweather reduced her weekly hours from full time (40 hours) to 30-32 hours a week. Vol. 5, at 51; Vol. 6, at 60.

Change #2. This change, however, did not completely alleviate Merryweather's employment problems. In September 2000, after several meetings and repeated attempts to encourage and train and help Merryweather, Mr. Jex made the decision to return her to floor/staff nursing and terminate her from her administrative position. Vol. 5, at 44. This new staff position was a low-impact nursing position dealing primarily with labor and delivery and the newborn nursery. Id. at 50-53. The district court clearly understood the distinction between these two separate employment changes. See R. at 1135.

Neither of these changes should have come as any surprise. Dr. Ashburn was deposed on June 9, 1999. In his deposition, Dr. Ashburn explained in detail that Merryweather's efforts to return to work full-time were causing more pain and symptoms, and that any attempt to return to full-time work would likely end in failure. R. at 929-30. Further, he explained that her work schedule would need to be reduced to part-time to allow her to be productive and successful. Id. In addition, Dr. Ashburn explained to

defense counsel that "it's very likely [that Merryweather is] going to fail" in her attempt to return to full-time employment. Id. at 927. Dr. Ashburn's trial testimony was consistent with his reports and opinions expressed at his deposition. See Vol. 4, at 66.

The District Court's Rulings on Admission of These Changes. Merryweather's economic expert, Dr. Randle, completed his initial economic report in September 1999; this report assumed that Merryweather was still a staff nurse. That is, Dr. Randle's September 1999 report (trial Exhibit #25) did not take into account *either* Merryweather's 1999 promotion from staff nurse to administrator (and concomitant increase in salary) *or* Merryweather's September 2000 demotion back to staff nurse. Upon learning of Merryweather's September demotion,[6] counsel instructed Dr. Randle to prepare an updated economic analysis based on the recent changes to Merryweather's employment status.

Dr. Randle produced a new report based on the new information; this report (trial Exhibit #25A) contained higher numbers regarding Merryweather's past and future lost wages.[7] Merryweather presented defense counsel with a copy of this new report on September 26. Vol. 5, at 3-24. However, when Merryweather attempted to introduce the

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[6] Dr. Randle and Merryweather's counsel met with Jex during the afternoon of September 25, 2000 (an off-day in the trial schedule) to prepare updated economic numbers and analysis. During this meeting, Jex disclosed to counsel that Merryweather no longer held the administrative position and had been reassigned to the low-impact staff nursing position. This was the first time that Merryweather's counsel learned of this *second* change in Merryweather's job status. R. at 804-13 (affidavit of Merryweather's counsel).

[7] The difference between Dr. Randle's original report and his new report was substantial. In the new report, which accounted for the promotion, Dr. Randle concluded that Merryweather's future wage losses were more than $290,000.00 greater than they had been under the prior calculations. Thus, the district court's decision to refuse admission of Exhibit #25A, based upon Defendant's objection, effectively prevented Merryweather from presenting evidence of an additional $290,000.00 in future lost wages.

new report during the trial, the Court, upon Defendant's objection, refused to allow it into evidence. The Court ruled that Dr. Randle would be restricted to using *only* the numbers prepared originally in his September 22, 1999 report (Exhibit #25). Id. at 17-19.

Thus, the only economic evidence from Dr. Randle that went to the jury did not take into account: (a) Merryweather's 1999 "promotion" to administrator; or (b) her September 2000 "demotion" back to low-impact staff nurse. Rather, the only economic evidence that went to the jury was computed on the basis of Merryweather's original staff nurse job with IHC and an anticipated reduction in hours worked.[8]

On the other hand, defense counsel was permitted to cross-examine Dr. Randle and Dr. Rollins on all of these topics. For instance, defense counsel was allowed to attempt to impeach the veracity of these witnesses (and their reports) on the basis of the March 1999 promotion and the resulting increase in salary. Vol. 5, at 147, 216-17. In fact, Defendant placed into evidence Merryweather's W-2 forms reflecting her historical income and the promotion and the significant increase in pay, id. at 61, and used these documents to cross-examine Dr. Randle, id. at 216-17.

C. Additional Trial Issues

1. Dr. Knorpp's fabrications and Mr. Cottle's rebuttal testimony.

Defendant called Scott Knorpp, M.D. ("Dr. Knorpp") as one of his expert witnesses at trial. Vol. 7, at 3. During Defendant's examination of Dr. Knorpp, Defendant offered a report into evidence that had been authored by Dr. Knorpp, and this report, with a

[8] The district court did allow Dr. Randle to state that, based upon her promotion and later demotion, Merryweather's future lost wages/income would be "higher." Vol. 5, at 17-19, 220. The court did not, however, permit the introduction of any numbers to substantiate or quantify this statement.

minor redaction, was admitted into evidence. Id. at 83. At the bottom of page 8 of Dr Knorpp's report, the following language appears:

> Given that this report was undated, *I took the liberty of speaking with Mr. Cottle via telephone* on January 18, 2000 to further review Mrs. Merryweather's case.

Id. at 50 (emphasis added).

On cross-examination, counsel questioned Dr. Knorpp about the telephone conversation referenced in the report, and about the specific statements Dr. Knorpp made to Mr. Cottle. Id. at 42-59. Initially, Dr. Knorpp agreed that he had called Mr. Cottle to express his "displeasure" at the manner in which Ms. Frandsen had failed to document provided services. He agreed that he had expressed "several criticisms" on the subject of documentation, and that he told Mr. Cottle that he felt Mr. Cottle had committed "malpractice" in failing to document the treatments. Id. at 43-47.

Dr. Knorpp testified that he couldn't recall if he told Mr. Cottle that he (Dr. Knorpp) didn't think that the undocumented therapy visits performed by Ms. Frandsen should be reflected in his prepared report. Dr. Knorpp did agree, after a review of his report (specifically pages 8-9), that the undocumented visits were in fact *not* included in his report, even though he had known about them. Id. at 49-51.

Dr. Knorpp admitted that he understood the conversation between Mr. Cottle and him to be "confidential." Id. at 53. But he denied that he had expressed—in a second phone call with the therapist—that the two had some kind of "gentleman's agreement" that Dr. Knorpp would not include the undocumented visits in his report. Id. at 58. Further, Dr. Knorpp denied that he stated that he was doing Mr. Cottle a "favor" by not including the undocumented visits in his report, because Mr. Cottle would be

"barbecued" during his testimony at the trial over the undocumented visits. Id. at 58-59.

Dr. Knorpp also denied that he told Mr. Cottle that he (Dr. Knorpp) would call both Mr. Cottle's "administrator" and "DOPL" (the Division of Occupational and Professional Licensing) and report Mr. Cottle's conduct. Id. at 56.

Following this litany of admissions and denials by Dr. Knorpp, Merryweather recalled Mr. Cottle as a rebuttal witness. The district court gave Merryweather only 5 minutes to present Mr. Cottle's testimony regarding the two phone conversations. Id. at 177. On the stand, Mr. Cottle described the conversations, and stated that he had brought with him to court a five-page, single-spaced handwritten summary of the conversations—notes that he had prepared on the day of the phone calls. Id. at 202-09. Mr. Cottle disagreed with Dr. Knorpp's recollection, and described to the jury the following particulars: the existence and the context of respective references by Dr. Knorpp to a "gentleman's agreement"; that Dr. Knorpp was doing Mr. Cottle a "favor" by not including the undocumented visits; the use of the term "barbecued" in reference to what would arguably happen to Mr. Cottle on the witness stand if he testified concerning the undocumented visits; and, finally, that Dr. Knorpp had indeed expressed to him that he was going to report Mr. Cottle to both his administrator and to DOPL. Id. at 202-05.

2. The context of counsel's so-called "plea to poverty."

Merryweather's counsel began his opening statement with a brief explanation of the basic elements of an injury case—negligence, causation and damages. After this brief introduction, Merryweather's counsel then set forth the chronological story of the case, including the collision and Merryweather's subsequent medical treatment. Vol. 1, at 134.

At this point in the argument, Merryweather's counsel employed a metaphor,

stating that on the date of the accident, a "fire" was started—a fire of pain in Merryweather's body. Merryweather's counsel stated that Merryweather had made numerous attempts to squelch the fire by medical means, but that the doctors had told Merryweather that the fire could not be extinguished, and that she would need life-long care and treatment for her chronic pain condition. Id. at 140-52.

In the context of this "fire" metaphor, counsel asked, rhetorically, "who pays for all of this pain medication" and other items. Id. at 153. The rhetorical answer to the rhetorical question, based on established principles of accountability and causation, was that the person "who started the fire" should be the person who should pay for the life-long medical treatment and care. Id. at 153. Immediately, Merryweather's counsel turned to the poster paper chart of the elements of a claim and pointed out that Defendant should be responsible and accountable for the injury and associated costs caused by his own admitted negligence. At no time did counsel discuss Merryweather's own financial situation, or suggest that she would have been unable to pay for the medical care through other means. Notably, this discussion occurred *prior* to any reference to Dr. Randle's economic report concerning future medical damages. Id. at 153; id. at 167.

At the conclusion of opening statements, Defendant first raised the issue of the so-called "plea to poverty," and asked the district court to declare a mistrial. Id. at 169-70.

SUMMARY OF THE ARGUMENT

The jury, after sitting for eight days and hearing the evidence and arguments of counsel, rendered a verdict in favor of Merryweather. The district court, on Defendant's motion for new trial, indicated that it was not entirely in agreement with the verdict, and conducted a thorough search for grounds upon which to grant a new trial. It found none.

R. at 1137-38. The court stated that it "would not hesitate to grant a new trial if it could, in good conscience, say that there was a part of the verdict that did not have evidentiary support." Id. at 1138. However, "[d]espite repeated efforts to find a good reason to grant a new trial, the court in every instance [came] back to the fundamental issue: there was evidence presented to the jury that supports the verdict." Id. at 1137.

On appeal, Defendant raises several issues that he maintains constitute reversible error. Most of these issues were scrutinized by the trial court during the new trial motion; each of the issues raised by Defendant must be reviewed for abuse of discretion. As shown below, the district court did not abuse its discretion in any of its evidentiary rulings, and did not abuse its discretion in denying the motion for new trial. For these reasons, as discussed more fully below, the judgment of the district court should be affirmed, and the jury's verdict upheld.

ARGUMENT

This Court should affirm the judgment of the district court, because the district court did not abuse its wide discretion in making the disputed rulings during the trial.

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE REBUTTAL TESTIMONY OF MR. COTTLE

A. Mr. Cottle's Testimony Was Properly Admitted Under Rule 608(c)

The district court correctly determined that Mr. Cottle's rebuttal testimony was properly admitted under Utah R. Evid. 608(c), which states: "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness *or by evidence otherwise adduced.*" Utah R. Evid. 608(c) (emphasis added); see also R. at 1136. The Utah Supreme Court has noted that this Rule "expressly allows extrinsic evidence of bias." See State v. Rammel, 721 P.2d 498, 500 n.1 (Utah 1986).

At the hearing on Defendant's new trial motion, the district court asked defense counsel: "[I]sn't it certainly possible to argue that if Dr. Knorpp in fact had made the statements that were claimed, that that shows bias or prejudice on the part of the witness?" Defense counsel responded by stating: "Yes, I think that could be argued, Your Honor." See Transcript from March 1, 2001 Hearing (excerpts of which are attached hereto as Exhibit A), at 4. The district court, based on this admission, ruled that "Defendant admitted at the hearing in this matter that the rebuttal testimony may have been proper 608(c) evidence of bias." R. at 1136. This alone is dispositive of Defendant's argument—defense counsel has admitted that Mr. Cottle's testimony is proper under Rule 608(c). That should end the matter.

In addition, the district court's determination—irrespective of any admission by defense counsel—was correct. The actions of Dr. Knorpp (in calling other potential witnesses and trying to suborn perjury)[9] certainly demonstrate his bias toward Defendant—the party paying him—and toward the medical diagnosis that would most benefit Defendant. From Dr. Knorpp's perspective, if he could orchestrate a way to effectually excise the undocumented physical therapy visits from the case, he could more easily reach the diagnosis that most benefited Defendant. That he took such dramatic steps toward accomplishing this goal shows his bias, and evidence of such bias may properly be introduced through extrinsic evidence pursuant to Utah R. Evid. 608(c).

B. Mr. Cottle's Testimony Was Properly Admitted Under Rule 608(b)

Mr. Cottle's rebuttal testimony was proper for another, wholly independent,

[9] The ironic aspect of Dr. Knorpp's actions is that he was conspiring to hide evidence that was already in the record (through Mr. Cottle's and Ms. Frandsen's deposition testimony) but which had not been provided to him by defense counsel.

reason—it is proper rebuttal evidence of a non-collateral matter. The Utah Supreme Court has stated that Rule 608(b) is concerned about "collateral issues" only. See State v. Hackford, 737 P.2d 200, 203 (Utah 1987). The Hackford Court also stated that Utah's evidentiary rules in this context (Rules 607-610) are very similar to the federal rules and that courts may look to the federal rules for interpretive guidance. Id.

Federal courts have been very clear about applying the collateral matter rule. That is, under Fed. R. Evid. 608(b), extrinsic evidence is admissible for impeachment purposes, as long as the evidence used to impeach does not concern a collateral matter. See, e.g., Palmer v. City of Monticello, 31 F.3d 1499, 1507 (10th Cir. 1994) (noting "the general rule barring the use of extrinsic evidence to impeach a witness on a collateral matter through contradiction," and stating that "the purpose of Rule 608(b)'s prohibition of extrinsic evidence is to avoid holding mini-trials on irrelevant or collateral matters"); see generally 4 Weinstein's Federal Evidence § 607.06, at 607-72 to 607-84 (2000).

The evidence regarding the telephone conversations between Dr. Knorpp and Mr. Cottle cannot possibly be a collateral matter. "The general test of whether evidence is collateral is whether the contradictory fact could have been shown for any purpose independently of the contradiction." See 4 Weinstein's, supra, at § 607.06[3][a]. Thus, the content of the telephone conversations is a collateral matter *only* if the content of the telephone conversations cannot come into evidence for any purpose other than to show that Dr. Knorpp is lying. This is clearly not the case here. The content of the telephone conversations is relevant to the veracity of the conclusions Dr. Knorpp's draws in his report (as well as Dr. Knorpp's bias, as shown above). It is relevant and admissible to show more than merely the fact that Dr. Knorpp lied; it is admissible to show, *inter alia*,

that Dr. Knorpp failed to include certain critical visits in his report, that Dr. Knorpp's report is based on faulty assumptions, and that Dr. Knorpp was biased, irrespective of any lies Dr. Knorpp may or may not have told while on the witness stand. Because the content of the telephone conversations is admissible to show more than the fact that Dr. Knorpp lied, the content of the conversations is *not* a collateral matter. Therefore, the rebuttal evidence is admissible under Rule 608(b).

C. Rebuttal Testimony Has Been Allowed by Utah Courts

In addition, the district court's decision to allow Mr. Cottle's brief rebuttal testimony is entirely in keeping with Utah practice. For instance, in a case applying Rule 608(b), this Court stated that a party, in addition to cross-examination, "may also introduce on rebuttal any evidence which would tend to contradict, explain, or cast doubt upon the credibility" of a witness. See State v. Reed, 820 P.2d 479, 482 (Utah Ct. App. 1991).

Moreover, the Utah Legislature has pronounced that

> in every case the credibility of the witness may be drawn in question, by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or by his motives, ***or by contradictory evidence***, and the jury are the exclusive judges of his credibility.

Utah Code Ann. § 78-24-1 (emphasis added).[10]

In Utah, "evidence should not be excluded from rebuttal merely because it could have been made part of the case-in-chief," and if courts are concerned about a plaintiff's ability to "sandwich" the defense through rebuttal, "surrebuttal, rather than the exclusion of competent and proper rebuttal evidence, is the proper remedy." Astill v. Clark, 956

[10] It is well settled that "constitutional requirements will trump a conflicting statute, just as a statute will trump a conflicting rule." See, e.g., In re Hudson, 260 B.R. 421, 444 (Bankr. E.D. Mich. 2000) (citing Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798)).

P.2d 1081, 1086 (Utah Ct. App. 1998).[11] In this case, defense counsel declined the opportunity for surrebuttal. See Vol. 7, at 209.

D. In Any Event, Defendant Introduced Evidence of the Telephone Conversations

Finally, Defendant's argument fails for yet another fundamental reason: Defendant is the one who introduced the evidence of the telephone conversations between Dr. Knorpp and Mr. Cottle. This evidence was included in Dr. Knorpp's report, which was introduced into evidence by Defendant. See Vol. 7, at 83. Thus, Defendant's entire argument (that rebuttal testimony is improper to rebut evidence first elicited on cross) fails for the simple reason that this evidence was not first introduced on cross; rather, it was introduced during Defendant's case-in-chief.[12]

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN THE MANNER IN WHICH IT HANDLED THE ISSUE OF DEFENDANT'S WHEREABOUTS

The district court did not abuse its discretion in the manner in which it handled the

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[11] Defendant cites Koch v. Koch Indus., Inc., 203 F.3d 1202 (10th Cir.), cert. denied, 531 U.S. 926 (2000), in support of his argument that rebuttal is only proper to rebut matters introduced on direct examination by the other party. Koch is of little assistance to Defendant. First, much of Koch's holding on the subject of rebuttal testimony is directly at odds with Utah law on the same topic, as set forth in Astill, Reed, and 78-24-1. Second, even assuming that the holding in Koch has application here, the court's holding was extremely narrow. The court held only that the trial court did not abuse its wide discretion in disallowing rebuttal evidence—certainly, Koch cannot be read to support the contention that a court making the opposite decision, and allowing the evidence, would have abused its discretion. For these reasons, Koch does not advance Defendant's cause.

[12] Defendant's citation to Turner v. Nelson, 872 P.2d 1021 (Utah 1994), is entirely unhelpful. The "reasonable anticipated test" that Defendant urges on this Court only applies where the potential rebuttal witness was undisclosed to the other party. See Turner, 872 P.2d at 1023; see also Astill, 956 P.2d at 1085. In this case, Merryweather listed Mr. Cottle as a potential witness in her witness designations, see R. at 111-12, and Defendant actually deposed Mr. Cottle, id. at 109. Turner simply does not apply here.

issue of Defendant's whereabouts. As explained above, at pages 8-11, defense counsel desired, from the beginning of trial, to tell the jury that Defendant was on an LDS mission in Brazil. The court did not allow this at that time; rather, the court told the jury that Defendant was "overseas" and "unavailable." However, in response to defense counsel's continued protestations, the court finally relented and allowed defense counsel, during closing argument, to tell the jury that Defendant was "serving his church in Brazil." Concomitantly, however, the district court also allowed Merryweather to argue that Defendant was absent because his version of events did not square with the version of events postulated by the defense's experts or defense counsel.[13] Defendant now argues that the court abused its discretion in handling this issue in such a manner.

First, Defendant's argument is fundamentally flawed. Defendant argues that "a new trial is warranted upon the *failure of the trial court to tell the jury exactly where the defendant was*," and that "*[n]ot allowing the jury to know where the defendant was* prejudiced the defendant." Aplt's Br. at 26-27 (emphasis added). These statements are highly misleading. The district court ***did*** allow defense counsel to tell the jury where

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[13] Defendant argues that the district court's decision to allow Merryweather to comment on this possible reason for Defendant's absence was improper. This argument must fail, however, because defense counsel never objected to those comments. In fact, Merryweather's counsel obtained the court's permission ahead of time to make that association, see R. at 841 (Transcript of October 2, 2000 hearing), at 25, and defense counsel did not object even then, id. All defense counsel said was that "if [Merryweather's counsel] makes that argument, . . . I have to then respond to that" and "the only way to do it is to discuss exactly where [Defendant] is and what he's doing." Id. In other words, defense counsel's only objection was that if Merryweather could point out that association, then defense counsel should get to tell the jury where Defendant was. As discussed herein, defense counsel got his wish—he was allowed to tell the jury where Defendant was. Thus, he got what he wanted, and did not make any further objection to Merryweather's submission regarding the possible reason for Defendant's absence. See Vol. 8, at 84. The district court's decision to allow the argument was not plain error.

Defendant was—that Defendant was "serving his church in Brazil." Vol. 8, at 44.

Apparently, then, Defendant's argument is that the district court abused its discretion by declining to inform the jury, at the beginning of trial instead of at the end, that Defendant was on an LDS mission, and that this decision was so prejudicial as to change the outcome of the trial. This argument cannot withstand scrutiny. After being told, at the outset, that Defendant (a college-aged male from a largely LDS community) was "overseas" and "unavailable," the jury almost certainly figured out where Defendant was. In any event, in making its determination, the district court weighed the potential prejudice to each side, and, within its discretion, chose a course of action that it perceived to be a middle ground addressing the stated concerns of both sides.[14] See R. at 841 (Transcript of October 2, 2000 hearing), at 24. Such action is not an abuse of discretion; rather, it is the epitome of a considered and careful exercise of discretion.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCUSING JUROR TAMS FOR CAUSE

The district court did not abuse its discretion in excusing Juror Tams for cause.[15] The district court, based on answers Juror Tams gave to questions posed by the court and

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[14] Defendant also argues that it was prejudiced because, while defense counsel did not get the tell the jury, at the beginning, where Defendant was, Merryweather got to allude to "church" softball games and the like. See Aplt's Br., at 27-28. This argument fails for the simple reason that Defendant did not object to any—not a single one—of the allusions to Merryweather's participation in "church" activities. See Vol. 2, at 46-47; Vol. 6, at 18, 68, 117. Thus, the district court's admission of such statements is reviewed under the plain error standard. Utah R. Evid. 103(d). Clearly, the district court's decision to allow these statements, without objection, was not obvious and plain error.

[15] Defendant asserts that "[t]he total inquiry regarding Mr. Tams is reproduced in Addendum C." Aplt's Br., at 47. This assertion is only partially true. The full story begins on page 70 of Volume 1, and continues on pages 83 and 87, before picking up again on page 97. See Vol. 1. Defendant's "total inquiry" omits the earlier pages.

counsel, had ample grounds for excusing Juror Tams.

A reading of the entire jury selection process in this case reveals that the court and counsel asked several questions designed to elicit a response from the jurors regarding their individual ability to be impartial. See Vol. 1, at 44-121. Where a concern was uncovered, the district court would ask the juror raising the concern a variation of the following question: "Do you feel that you could be fair and impartial?" E.g., id. at 62. In each instance in which the juror gave anything other than an unqualified "yes," the district court asked additional questions to ascertain the basis for the juror's concern, and then, if the concern was not cleared up, excused the juror for cause. The district court excused seven jurors (other than Juror Tams) for this reason. See id. at 62, 63, 64-65, 68, 69-70, 94-95, 103, 109-10 (excusing Jurors Irwin, Peña, Chambers, Stevens, Knickmeier, Anderson, and Erickson for cause). Although Defendant would naturally not have had any incentive to object to the dismissal of Jurors Irwin, Peña, Anderson, and Erickson because of possible sympathies to Merryweather, Defendant did not lodge any objection to the dismissal of Jurors Chambers, Stevens, or Knickmeier, who appeared to sympathize with Defendant, despite the fact that at least two of these jurors (Chambers and Stevens) gave answers remarkably similar to Juror Tams' answers. Id. at 64-65, 68.

Of all the jurors excused for cause, Defendant objected only to Juror Tams' dismissal. Juror Tams first raised his hand in response to a question regarding whether he or a member of his family had been "either a plaintiff or a defendant in a similar case." Id. at 69. Juror Tams stated that "my daughter was a defendant, or is a defendant, in a pending traffic type of accident." Id. at 70. Later, Juror Tams raised his hand again when asked about "any alleged lawsuit crisis or jury verdict crisis or controversy." Id. at 87.

Based on these two responses, Juror Tams was called into chambers for further questioning out of the presence of the full jury panel. Counsel asked Juror Tams "if you've drawn any conclusions or preconceived ideas or anything about that?" Juror Tams responded by stating that "[t]here's a couple of things it goes back to. One is certainly with my daughter and the lawsuit she's in. That does put a little stress on it." Id. at 97.[16] Juror Tams added that

> Also what I heard in the questioning was something about have you heard anything on this case. What I mean is about excessive awards of compensation. Some things that come to my mind are things like the spilled coffee and the award there. That does bother me a little bit. Of course, I don't know all the facts of the case, but it does bother me.

Id. at 98. Counsel asked: "Other than your thoughts about what you have expressed today about your daughter and the McDonald's case, do you have any problem in assuring is that you can be fair to both sides and be impartial?" Id. at 99. Juror Tams replied:

> That's one of those things, where you have a daughter similarly involved, *it's kind of emotional*. I do have to say that I really think I could, but when you start to talk about those emotions, *there's going to be something in the back of my mind*.

Id. (emphasis added). Finally, Juror Tams was asked if he could "look at the facts and decide based on the facts that are presented and make a determination of what is fact and go from there." Id. at 100. Juror Tams responded that "I think I can. *It's kind of hard to say absolutely*. I think I can." Id. (emphasis added).

A few minutes later, the court stated that Juror Tams

> struggled significantly on several occasions indicating how much the issue with his daughter in New York weighs on his mind and how emotionally

[16] Defendant states in his brief that Juror Tams raised a concern about "a hypothetical case involving a daughter." See Aplt's Br., at 47. This statement is false. The case involving Juror Tams' daughter was far from hypothetical—it was a real case involving a real accident that was "kind of emotional" for Juror Tams. Vol. 1, at 99.

> attached he is to that. He believes he could set it aside. He really struggled in that answer and it appeared to the court that—we don't know any of the circumstances of that lawsuit, other than he very much empathized with his daughter and felt it was *a tremendous issue* for him and for her.

Id. at 101-02 (emph. added). Upon this basis, the court excused Juror Tams. Id. at 104.

The district court's decision was entirely proper, and was certainly not an abuse of discretion. It has long been held, under Utah law, that a juror who raises issues as to his impartiality should be dismissed for cause. See. e.g., State v. Hewitt, 689 P.2d 22, 26 (Utah 1984) (holding that a juror who gave a "general and indefinite" response stating that he could be fair, but also stated that he would tend to give police officers, rather than defendants, "the benefit of the doubt," should have been removed for cause); Jenkins v. Parrish, 627 P.2d 533, 536 (Utah 1981) (holding that a juror who indicated that she would favor the defendant-physician's testimony over that of the plaintiff should have been removed for cause, even though the juror expressed a desire and ability to remain impartial); Crawford v. Manning, 542 P.2d 1091, 1092 (Utah 1975)[17] (holding that a juror who stated that she had strong feelings about anyone who would sue to recover money for the death of another should have been dismissed for cause, despite the fact that the juror stated that she could render a verdict free of bias). In each of these cases, the district court had refused to excuse the juror for cause, and in each of these cases it was held to be error for the district court *not* to have excused the jurors for cause.

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[17] These cases (Hewitt, Jenkins, and Crawford) all applied an "automatic reversal" rule, meaning that when a juror was improperly excused (or not excused) for cause, automatic reversal would result. The automatic reversal rule was abrogated by the Utah Supreme Court in State v. Menzies, 889 P.2d 393 (Utah 1994). However, neither Menzies nor any of its progeny have overruled Hewitt, Jenkins, or Crawford as regards those cases' holdings on the issues relevant here—that is, whether there was error at all (whether or not automatically reversible) in a trial judge's handling of for cause dismissals.

Thus, in this case, the district court made the right decision. Indeed, the opposite decision—refusing to excuse Juror Tams for cause—may have been reversible error, given Juror Tams' statements that he was "emotional" about his daughter's accident and that he was unsure whether he could render an unbiased verdict. Recently, the Utah Supreme Court stated that

> [w]e emphasize again that trial judges should err on the side of caution in ruling on for-cause challenges and that the scope of judicial discretion accorded a trial judge must be evaluated in light of the ease with which all issues of bias can be dispensed by the simple expedient of replacing a questionable juror with another whose neutrality is not open to question.

See State v. Saunders, 1999 UT 59, ¶51, 992 P.2d 951. The district court's decision to excuse Juror Tams, and to replace him with another juror whose neutrality was not open to question, was the right decision.[18] There was no abuse of discretion.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE EXPERT TESTIMONY OF DR. ROLLINS

The district court did not abuse its discretion in admitting the expert testimony and

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[18] Defendant argues that "Utah law requires trial courts to expend significant effort in rehabilitating a potential juror to whom even an inference of bias has attached," see Aplt's Br., at 48, and asserts that the district court failed to adequately attempt to rehabilitate Juror Tams. While Defendant's statement of law is correct as far as it goes, the argument fails for two reasons. First, the district court *did* attempt to rehabilitate Juror Tams. As discussed above, the court invited Juror Tams back into chambers, outside the presence of the rest of the jury pool, for further questioning. The questioning of Juror Tams takes up at least portions of ten (10) pages of trial transcript. This is simply not a case where the trial court accepted, without further examination, the bald answer of a prospective juror that he could not be fair. Second, after the district court's further questioning of Juror Tams, a strong inference of bias remained, and in such a situation even the cases cited by Defendant require that a trial court dismiss the juror for cause. See State v. Baker, 884 P.2d 1280, 1283 (Utah Ct. App. 1994) (stating that "[o]nce such strong feelings are revealed, a prospective juror may not sit, even if the prospective juror later asserts that he or she can render an impartial verdict") (citing cases), rev'd on other grounds, 935 P.2d 503 (Utah 1997).

report of Dr. Rollins. Defendant argues that the district court erroneously admitted Dr. Rollins' testimony, and that without Dr. Rollins' testimony, there is insufficient evidence to support the verdict. Defendant therefore asserts that the district court, after having excluded Dr. Rollins' testimony, should have granted Defendant's motion for a directed verdict. This contorted argument fails for the simple reason that Dr. Rollins' testimony and life care plan is routine expert testimony, commonly admitted in Utah and other states, regarding an injured party's future expenses, and was properly admitted here.

A. Dr. Rollins' Testimony Was Sufficiently Certain

Defendant first argues that Dr. Rollins' testimony lacked certainty, because he did not testify that Merryweather would incur the enumerated future expenses to a "reasonable certainty." Aplt's Br., at 41. Defendant argues, citing Robinson v. Hreinson, 409 P.2d 121, 125 (Utah 1965), that the proper standard of "certainty" for future medical expenses is not "based upon a reasonable medical probability" ("the BURMP Standard"), but, rather, the "reasonable certainty" standard as set forth in Robinson.

1. The "reasonable certainty" standard is the same thing as the BURMP Standard.

First, Defendant's argument is based on semantics. He argues that an expert's statement that damages will be incurred "based upon a reasonable medical probability" is not good enough; rather, he asserts that the expert must state that the future damages will be incurred to a "reasonable certainty." See Aplt's Br., at 41-42. Defendant is playing word games. Even Defendant's own cited case explains that damages, even future damages, may be proven with evidence that the damages are more probable than not:

> There must be a firm foundation for any award by proof that is *at least more probable than not* that the damage *will be suffered.* For this reason, the jury should not be allowed to assess future damages on probability, but

> only such damages as it believes *from the preponderance of the evidence* the plaintiff will with reasonable certainty incur in the future.

See Robinson, 409 P.2d at 125 (italics added). Justice Crockett, the author of the opinion in Robinson, explained that:

> The law does not and cannot require absolute certainty. If we can predict circumstances with *reasonable certainty*, that is a sufficient foundation upon which to base our plans and actions. The traditionally accepted test of the law is that a fact may be found if reasonable minds may believe it by a preponderance, or greater weight of the evidence. *This means that if it can reasonably be believed that it is more probable than not, or that it will with reasonable certainty occur, a finding of such fact is justified.* That is the test to apply in determining whether the evidence will support an award of future damages.

Gould v. Mountain States Telephone & Telegraph Co., 309 P.2d 802, 807 (Utah 1957) (Crockett, J., concurring) (emphasis added).

In fact, Defendant's argument has been made once before in Utah, and has been soundly rejected. In Kirchgestner v. Denver & R.G. R. Co., 218 P.2d 685 (Utah 1950), rev'd on other grounds on reh'g, 233 P.2d 699 (Utah 1951), a personal injury case, the trial judge instructed the jury that "the plaintiff was entitled to recover for all pain and suffering that he 'will probably endure' in the future." Id. at 693. The defendant argued that this was error, and that the trial court should have instructed the jury that a plaintiff could only recover for "such future pain and suffering as the evidence established with 'reasonable certainty.'" Id. The defendant's argument was rejected, and the Utah Supreme Court upheld the instruction containing the language "will probably endure." Id.

These authorities demonstrate that, whether phrased in terms of "reasonable certainty" or "based upon reasonable medical probability," the standard is the same—evidence of future damages is admissible if such future damage is more likely than not to occur (that it is a probability rather than a possibility). See Dalebout v. Union Pac. R.

Co., 1999 UT App 151, ¶21 & n.2, 980 P.2d 1194 (noting the "confusing clutter of labels" that all amount to the same thing); Phillip E. Hassman, J.D., Annot.: Admissibility of Expert Medical Testimony as to Future Consequences of Injury as Affected by Expression in Terms of Probability or Possibility, 75 A.L.R.3d 9, at § 2[a].

2. The district court properly instructed the jury.

In this case, the district court properly applied these standards in instructing the jury. The Model Utah Jury Instructions regarding special damages state as follows:

> In awarding such damages, you may consider the reasonable value of medical [hospital and nursing] care, services and supplies reasonably required and actually given in the treatment of the plaintiff [and the reasonable value of similar items that *more probably than not* will be required and given in the future.

MUJI § 27.3 (emphasis added). In discussions with the district court and counsel regarding jury instructions, Defendant's only objection to this instruction was that he wanted a clause regarding proximate cause tacked on to the end. See Vol. 6A, at 16. The trial court granted that request, and therefore the jury instruction that was actually given to the jury on this point reads as follows:

> In awarding such damages, you may consider the reasonable value of medical care, services and supplies reasonably required and actually given in the treatment of the plaintiff and the reasonable value of similar items that ***more probably than not*** will be required and given in the future, proximately caused by the defendant's negligence.

See R. at 697 (jury instruction #23) (emphasis added, portion requested by Defendant underscored). Defendant did not take exception to this instruction, as given, in any way.

3. Dr. Rollins' testimony comports with this standard.

Dr. Rollins' testimony comports with this standard and with the instruction given. As set forth above, at pages 6-7, Dr. Rollins' testimony was based upon Dr. Ashburn's

opinion, based upon a reasonable medical probability, that Merryweather would require certain medical treatment in the future. During his direct examination, Dr. Ashburn testified regarding each and every section of Dr. Rollins' report, concluding that each item listed would be required, based on a reasonable medical probability. See Vol. 4, at 84-91, 94-98. Significantly, Defendant did not object to any of these conclusions.

Dr. Rollins took the stand after Dr. Ashburn, and testified that, in essence, he had put a price (in year 1999 dollars for the northern Utah area) on the items that Dr. Ashburn had testified would be necessary to a reasonable medical probability. Vol. 5, at 98. Dr. Rollins stated that the amounts listed were based on reasonable medical/rehabilitative probabilities. Id. at 100-01. Dr. Randle then computed the present value, based on accepted economic principles, of the amounts testified to by Dr. Rollins. Id. at 200.

Thus, there is evidence from three experts, including a medical doctor, to support the contention that Merryweather will, more probably than not, require specific types of future medical attention. There is nothing in Utah law that requires future damages to be proven to a greater degree of certainty that this.

B. Dr. Rollins' Testimony Was Sufficiently Reliable

Defendant next argues that Dr. Rollins' testimony was inadmissible because it was "based on novel scientific principles or techniques" and is therefore not sufficiently reliable under the principles set forth in State v. Rimmasch, 775 P.2d 388 (Utah 1989). This argument is patently meritless for two reasons. First, Dr. Rollins' testimony regarding an injured person's life care plan is not "novel" or based on "unique" scientific principles, and therefore Rimmasch does not even apply. Second, even if Rimmasch did apply, Dr. Rollins' testimony is sufficiently reliable under even that heightened standard.

1. Dr. Rollins' testimony is not novel.

Dr. Rollins' testimony is anything but novel. In essence, Dr. Rollins is asked to take medical diagnoses (made by physicians) regarding a patient's future medical needs (e.g., number of physician visits required, amount and type of medication required) and future employment prospects (e.g., full-time, part-time) and thereafter "cost-factor," or place a price tag on, those needed items in the relevant geographic region. Vol. 5, at 81. Dr. Rollins, and other rehabilitation experts, generate expert reports known as "life care plans" that set forth the amount of money required to keep up with a patient's future medical needs.[19] In addition, Dr. Rollins and other rehabilitation experts also generate estimates of a plaintiff's future lost wages, based upon the amount of money a plaintiff makes before the injury as opposed to after its effects are felt. In this case, Dr. Rollins made no independent diagnoses of his own—he simply placed the diagnoses of medical doctors into economic terms, based upon his own research and interviews.[20]

This type of evidence is by no means "novel" or based on "novel" scientific techniques. Life care plans are generated in nearly all major personal injury cases, and in some cases are generated by both plaintiffs and defendants. The burden of proof based upon the existing law of damages in Utah requires plaintiffs to prove needs, injuries and damages based upon a reasonable medical probability. Cf. R. at 693, 697 (jury instructions). A life care plan is imply the tool that allows this burden to be met, in

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[19] Dr. Rollins stated that he develops "life care plans which are road maps and guides for people with disabilities and handicaps as a result of illness, injury, or disease events in their life. And develop those with respect to identifying the unmet needs and the costs of those goods and services." Vol. 5, at 74.

[20] Indeed, Dr. Rollins stated that he gave Dr. Ashburn "veto power" over his report respecting whether the medical services set forth therein were reasonable. Vol. 5, at 99.

association with physicians and economists, by providing geographical cost-factoring of probable future needs and expenses. Dr. Rollins himself has been qualified to offer his opinions in court in more than 13 states, and has been qualified as an expert to offer his opinions at least 6 times in the courts of the state of Utah. See Vol. 5, at 78.

Moreover, rehabilitation experts are now so widespread and so well-recognized that they have their own board certification process. Dr. Rollins stated that he is "board certified as an expert in trauma and stress in a division known as rehabilitation trauma and stress," and as a "rehabilitation specialist with training in certification in stress and tension management." Id. at 77. Dr. Rollins further stated that he holds "board certification in forensic medicine, not for the purposes of practicing medicine but for developing life care plans and working with medical models." Id.

In short, there can be "no plausible claim that the type of expert testimony which was offered . . . in the case was based upon novel scientific principles or techniques."[21] Patey v. Lainhart, 1999 UT 31, ¶16, 977 P.2d 1193; see State v. Kelley, 2000 UT 41, ¶19, 1 P.3d 546; Rimmasch, 775 P.2d at 396 (the heightened standard applies only when the testimony is "based on newly discovered principles"). Where there can be no plausible argument that the expert's opinions are based on newly discovered principles, Rimmasch is not even implicated. Patey, 1999 UT 31, ¶16, 977 P.2d 1193 (stating that the expert's testimony "did not even implicate Rimmasch, much less violate its requirements").

Where Rimmasch is not implicated, the standard for admissibility is set forth in

[21] Defendant asserts, without a citation to the record or to case law, that "[t]he science employed [by Dr. Rollins] was shown to be unique." See Aplt's Br., at 43. Defendant does not specify who showed it to be unique, or when and where this "showing" occurred. Of course, this is because there was never any such "showing." Dr. Rollins' testimony is not unique, or based on a novel science or newly discovered principles.

Utah R. Evid. 702—expert testimony is admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." See State v. Adams, 2000 UT 42, ¶17, 5 P.3d 642. In this case, the district court correctly determined that, for the reasons set forth above, Dr. Rollins had specialized knowledge that would assist the jury. Accordingly, the court did not abuse its discretion in admitting Dr. Rollins' testimony.

2. Even under the Rimmasch standard, Dr. Rollins' testimony is reliable and admissible.

Even assuming, however, that the heightened reliability standards of Rimmasch were applicable here, Dr. Rollins' testimony is sufficiently reliable to pass muster even under those standards. The first step in the three-step Rimmasch analysis is a determination as to "whether the scientific principles and techniques underlying the expert's testimony are inherently reliable." See State v. Crosby, 927 P.2d 638, 641 (Utah 1996).[22] A court can do this by judicial notice "if the scientific principles and techniques at issue have been generally recognized and accepted by the legal and scientific communities." Id. There can be no question that placing a price tag on a medically-determined amount of future medical care and on future employment income, if "science" at all, is a methodology that has been fully accepted by the legal and scientific communities. Again, life care plans are used in the vast majority of significant personal injury cases,

[22] The three-step Rimmasch analysis is difficult to apply in this case because Dr. Rollins' testimony is neither novel nor based on newly discovered scientific principles. See supra Part IV.B.1. In addition, Defendant's 5-word objection ("Objection, your honor; foundation, Rimmasch," Vol. 5, at 95) did not cover any of this; in other words, Defendant never asked the court to apply this three-step analysis to Dr. Rollins' testimony (and, incredibly, even Defendant's appellate brief does not contain any discussion of this three-step analysis). Typically, Rimmasch/Daubert motions involve a request for the district court to conduct a complete gatekeeper hearing, out of the presence of the jury, and full inquiry into the expert testimony, including full briefing. Defendant did not take such action, and therefore this Court has no Rimmasch findings from the district court to review.

often by both sides, and are an established method of estimating future damages.

The second Rimmasch step involves a determination that "the scientific principles or techniques at issue have been properly applied to the facts of the particular case by sufficiently qualified experts." Id. Here, Dr. Rollins testified that he got his prices from established medical texts (e.g., Medacode) and obtained further information by interviewing relevant people, such as Mr. Jex and Dr. Ashburn. There can be no question that Dr. Rollins properly applied pricing techniques in this case.

The third and final step in the Rimmasch analysis involves a determination, under Utah R. Evid. 403, as to whether "the proffered evidence will be more probative than prejudicial." Id. Again, Defendant did not specifically ask the district court to make such a finding. See supra note 22. However, it should be obvious that placing pricing information into evidence is not prejudicial at all, and is probative of how much it will cost Merryweather for future medical care, etc.

In short, Rimmasch does not apply here at all, because Dr. Rollins' testimony is not novel or based on newly discovered principles. Even if Rimmasch did somehow apply, Dr. Rollins' testimony is sufficiently reliable to meet even that standard. The district court did not abuse its discretion in admitting this testimony.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING MR. JEX TO TESTIFY REGARDING THE DEMOTION

The district court did not abuse its discretion in allowing Mr. Jex to testify regarding the September 2000 demotion, and did not abuse its discretion in denying Defendant's motion for a new trial on this issue.

A. Defendant Deliberately Obfuscates and Confuses the Multiple Changes in Merryweather's Employment Status

Defendant's entire argument on this point is premised on what appears to be a deliberate[23] obfuscation of the facts. Defendant accuses Merryweather of "trial by ambush," but this claim loses its luster after an examination of the actual facts of the case. As explained in greater detail above, see pages 11-14, Merryweather's employment at BRVH underwent several changes, including ***two*** changes in the months immediately prior to trial. The following summary reflects Merryweather's actual employment:

- Until October 1997—full-time staff nurse, 40 hours per week.
- October 1997-March 1998—unable to work at all.
- March 1998-March 1999—upon her return to work, and due to the pain she was suffering, she was unable to continue as a staff/floor nurse. She was given a new position completing administrative and ministerial tasks. This was a full-time position.
- March 1999-Summer 2000—promotion to #3 administrator at BRVH. This was a full-time position.
- Summer 2000-September 2000—due to physical difficulties that were affecting her job performance, and upon the advice of Dr. Ashburn, Merryweather reduced her hours from 40 to 32 per week, but remained employed as the #3 administrator at BRVH.
- September 2000—after several meetings and repeated attempts to encourage and help Merryweather, Mr. Jex made the decision to demote her from her administrative position and return her to floor/staff nursing, where she would be asked to perform low-impact tasks dealing primarily with labor and delivery and the newborn nursery.

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[23] It is entirely possible that Defendant and his counsel were, in the beginning, in good faith confused about the changes in Merryweather's employment status. However, after trial, new trial briefing, oral argument on the new trial motions, and the trial court's decision on the new trial motions, good faith confusion no longer seems plausible. See R. at 1135 (district court's new trial opinion clearly setting forth the distinction between the various changes in Merryweather's employment status).

Throughout this time period, Merryweather was being told by her physicians that, due to her pain, any attempt to return to work full-time would end in failure. R. at 927, 929-30. Defendant was fully aware of these findings and opinions, and, prior to trial, had been given (through discovery supplementations) documents evidencing each of these employment changes *except* the September 2000 demotion. See R. at 1135 (district court stating that "[t]here is no dispute that Plaintiff had, in a number of disclosures, indicated the Plaintiff's ongoing problems at her work"); Aplt's Br., at 22 ("Defendant was provided plaintiff's medical and employment records even after the discovery cut off in this case").

At the beginning of trial, Merryweather's counsel did not yet know of the September 2000 demotion. See R. at 804-13. The statements made by Merryweather's counsel during opening statement (cited in Aplt's Br, at 22-23, 24) were references to the summer 2000 cutback in hours, and not to the September 2000 demotion.[24] The district court understood this. See R. at 1135.

In short, there was no "ambush" here. Any accusations to the contrary are based on a deliberate obfuscation of the facts of this case.

B. The District Court's Evidentiary Rulings on This Issue, On Balance, Were in Favor of Defendant

When informed of the new employment developments, the district court made a series of evidentiary rulings. As discussed above, the court did allow Mr. Jex to state that Merryweather had been demoted because of her difficulties at work. However, the court refused to allow the admission of Dr. Randle's updated economic report, which took into

[24] If "defense counsel had no idea what plaintiff's counsel was talking about" in opening statement, see Aplt's Br., at 23, that ignorance was not Merryweather's fault. There is no dispute that documents (e.g., medical and employment records) evidencing Merryweather's summer 2000 cutback in hours had been given to defense counsel before trial.

account the March 1999 promotion and the September 2000 demotion. Because of this ruling, the only economic evidence that actually went to the jury was Dr. Randle's previous 1999 report, which was based on pre-March 1999 employment information.

While Merryweather was prevented from incorporating these recent developments into her economic analysis (which deprived her of the chance to present evidence of an additional $290,000.00 in future lost wages), Defendant was permitted to make full use of the March 1999 promotion and later employment developments in his cross-examination of Merryweather's experts, including Dr. Rollins and Dr. Randle.[25]

This set of evidentiary rulings by the district court was certainly not an abuse of discretion. If anything, Defendant came out ahead on the entire set of rulings.

C. The District Court's Rulings Were Not an Abuse of Discretion

Defendant argues that the district court erred in denying his motion for a new trial on this point. That motion was grounded in Utah R. Civ. P. 59(a)(3), which provides that "a new trial may be granted" on the basis of "[a]ccident or surprise, which ordinary prudence could not have guarded against." In this case, the evidence of the demotion was not known to either party until September 25 (during trial), but should not have come as a surprise to anyone. The district court certainly did not abuse its discretion in handling

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[25] Defendant argues that the evidence of the demotion undercut his "strong argument against [Merryweather's] claim for future lost wages." See Aplt's Br., at 19. However, any argument, no matter how "strong" it looks, is only as good as the facts supporting it. When those facts change, the argument's strength changes as well. Defendant had been repeatedly told, by medical experts, that Merryweather's attempt to maintain full-time employment would fail. That it finally did fail is a fact, and Defendant seeks to hide this fact from the jury in an attempt to prop up his "strong argument." Defendant and his counsel are certainly aware that the facts, in personal injury cases, are fluid right up to and even after trial, because such cases involve real injured people whose quest for proper medical treatment and level of employment does not begin or end with a trial.

this situation as it did, and in denying Defendant's motion for a new trial.

1. The demotion was hardly a surprise.

As noted above, Defendant was on notice, through supplementations and depositions, that Merryweather was having problems at work, and that any attempt to maintain full-time employment was likely to end in failure. E.g., R. at 927, 929-30. Defendant and his counsel made the risky tactical decision to ignore this evidence, and to build a trial strategy around the argument that Merryweather was being paid more in the administrative position than as a staff nurse. Defendant's tactical decision backfired, and he is not entitled to another bite at the apple by pleading "surprise."

2. Defendant could have uncovered further evidence of Merryweather's employment problems.

Furthermore, Rule 59(a)(3) is only available to parties that have "utiliz[ed] . . . available discovery procedures." Anderson v. Bradley, 590 P.2d 339, 341-42 (Utah 1979). A party that sticks its head in the sand and fails to fully avail itself of the discovery process may not hide behind Rule 59(a)(3) when the facts at trial turn out to be different than previously assumed. In this case, Defendant did not:

- depose Mr. Jex, despite the fact that both Merryweather and Defendant had designated Mr. Jex as a possible witness, see R. at 94, 231;
- depose anyone else at BRVH, or at BRVH's parent company, Intermountain Health Care;
- depose Dr. Randle, the economist who would ultimately testify to the jury regarding Merryweather's wage loss; or
- ask for a follow-up deposition of Merryweather in the 22 months prior to trial, despite having received documents indicating problems at work and the cutback in hours in the summer of 2000.

Had Defendant bothered to take these depositions, he would have learned further facts re-

garding Merryweather's problems at work, and would have been able to more fully probe the likelihood of a demotion in the face of the summer 2000 reduction in hours worked.

Defendant, however, took none of these actions. Rather, as soon as Defendant hit upon the "strong argument" based on the higher pay, he more or less ceased efforts to discover additional related information. In such a situation, Defendant cannot be said to have been *unfairly* surprised by the September 2000 demotion.[26]

This is especially true in this case, where the district court carefully considered what to do about this piece of evidence, and issued a series of evidentiary rulings which, on balance, benefited Defendant more than Merryweather. In such an instance, the district court did not abuse its discretion in handling the situation the way it did, or in denying Defendant's motion for a new trial on that point.

VI. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN THE MANNER IN WHICH IT HANDLED ISSUES RELATING TO COMMENTS MADE BY COUNSEL

Finally, Defendant complains of certain statements made by Merryweather's counsel at various points in the trial proceedings, and asserts that these statements were "inflammatory" and "prejudicial" and entitle Defendant to a new trial. This desperate

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[26] Defendant's citation to Royalty Petroleum Co. v. Arkla, Inc., 129 F.R.D. 674 (W.D. Okla. 1990), cannot save his argument. First, the Arkla case had nothing to do with Rule 59(a)(3)—indeed, the movant in that case was not even seeking a new trial. The court was simply not deciding the same issues presented here. Second, the evidence allegedly kept until the last minute in Arkla was a document that had been in Arkla's files all along, but which it did not disclose until the eve of trial. In this case, by contrast, Merryweather properly supplemented her discovery responses. Third, the court in Arkla specifically found that, in the absence of the supplemental information, plaintiff "had no expectation" that any such evidence would be introduced. In this case, by contrast, Defendant had every reason to expect evidence of Merryweather's problems at work, and of the likely failure of her efforts to work full-time, based on the information already disclosed. The Arkla case simply has no bearing on this one.

argument is without merit; the district court did not abuse its discretion in allowing these statements to be uttered or in denying (1) Defendant's motion for a mistrial at the conclusion of Merryweather's opening statement or (2) Defendant's motion for a new trial based on these statements.

A. Statements Made During Opening Statement

Defendant takes issue with counsel's "fire" metaphor, and counsel's inference that the party who started the "fire" is the party accountable to pay for the damage caused by the "fire." See supra pages 16-17. Defendant characterizes this metaphor as an improper "plea to poverty" that, he asserts, inflamed the passions of the jury and caused them to issue an excessive verdict. This argument fails for several reasons.

First, Defendant did not lodge a timely objection to these statements. At the time the statements were made, Defendant said nothing. See Vol. 1, at 152-53. Rather, Defendant waited until the conclusion of counsel's argument, and at that point moved for a mistrial. Id. at 169. When that motion was denied, Defendant did not move for a curative instruction, or seek any other remedy whatsoever.[27]

Second, the statements made by counsel were not an inflammatory "plea to poverty." Rather, these statements were part of a simple metaphor on the subject of

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[27] In fact, a complete review of this portion of the trial transcript indicates that the real intent and focus of Defendant's motion for a mistrial was to circumvent the collateral source rule and seek the court's permission to allow a full discussion of health insurance benefits. Vol. 1, at 169-77. The court denied the motion for a mistrial, and cautioned Defendant regarding the insurance issue, stating that "we don't go there and I'm admonishing [both counsel] not to go there." Id. at 175. Defense counsel promised to "stay away from" the insurance issue, id. at 177, but, later, asked Ms. Frandsen if she "understood that [Merryweather] had *benefits* that could pay for those treatments." Vol. 2, at 173 (emphasis added). Merryweather objected, and was sustained by the court. Id. Defendant continues this "benefits" effort in his brief. Aplt's Br., at 38-39 & n.6.

accountability. Defendant argues that "[w]ith fault admitted, 'accountability' is irrelevant." See Aplt's Br., at 35. However, Defendant neglects to mention that, while he had admitted liability, he was strenuously defending the case on causation grounds. See Aplt's Br., at 4 (stating that "the medical issues surrounding causation . . . were hotly contested"). Under these circumstances, a discussion of accountability and the basic elements of a tort claim is entirely appropriate. It is not a "plea to poverty."[28] See R. at 1136 (district court's statement that these remarks "when taken in context, would not have caused the jury to perceive impecuniosity").

B. Statements Made During the Trial

Next, Defendant takes issue with certain statements of counsel during the trial. These statements were all innocuous side comments that either (1) were not objected to, or (2) were objected to and the objection was sustained. The court could not possibly have erred, because with respect to these comments it gave Defendant all it asked for.

Mr. Knight. During counsel's cross-examination of Newell Knight, counsel asked Mr. Knight how much work he does for defendants. Mr. Knight stated that "*as you well know*, I do much more defense work." Vol. 6, at 166 (emphasis added). Counsel stated briefly "I do know." Id. at 167. Defendant objected, and the objection was sustained. Merryweather, quite frankly, does not understand how the trial court, from Defendant's perspective, could have erred here. It gave Defendant what he asked for.

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[28] Indeed, counsel nowhere suggested that Merryweather was *unable* to pay for the medical treatment resulting from the accident; rather, counsel suggested simply that Merryweather shouldn't *have* to pay for it, since she didn't start the "fire." For these reasons, the case law cited by Defendant is entirely inapplicable—in each of those cases, the statement reflected a party's ability (or inability) to pay. See, e.g., Hoffman v. Brant, 421 P.2d 425, 428 (Cal. 1966) (statement that the amount demanded would send his client into a home for the indigent).

Dr. Weight. During counsel's cross-examination of Dr. David Weight, Dr. Weight stated to counsel that "you had instructed [a friend of Merryweather's] not to talk to me." Id. at 231. In response, counsel stated "[t]hat's correct." Id. Defendant objected, and the objection was sustained. Id.

Later during that same cross-examination, counsel stated to the witness that "it's my job to get to the bottom of—of your opinions and see if they hold any water." Id. at 242. Again, Defendant objected, and the objection was sustained. Id. Merryweather, quite frankly, does not understand how the trial court, from Defendant's perspective, could have erred with respect to these statements made during the cross-examination of Dr. Weight. It gave Defendant everything he asked for.

Dr. Knorpp. During counsel's cross-examination of Dr. Knorpp, counsel noticed that Dr. Knorpp was wearing a suit remarkably similar to the one counsel himself was wearing. Counsel remarked "[t]hat's a nice looking suit today." See Vol. 7, at 18. Defendant did not object to this statement; rather, defense counsel asked "[i]s that a question?" Id. The court instructed counsel to "proceed." Id.

There is no way that any of these statements were harmful or prejudicial. In any event, Defendant got everything he asked for by way of relief from the district court related to these statements. There is no error here.

C. Statements Made During Closing Argument

Finally, Defendant takes issue with certain statements by counsel during closing argument. Again, as with the other statements, these statements were either (1) not objected to or (2) were remedied with a sustained objection. It is well-settled under Utah law that "[c]ounsel for both sides have considerable latitude" during closing argument,

including "the right to discuss fully from their standpoints the evidence and the inferences and deductions arising therefrom." See State v. Lafferty, 2001 UT 19, ¶92, 20 P.3d 342. The statements made were within counsel's wide latitude, and the trial court did not abuse its discretion (or commit plain error) by allowing these statements to be uttered.

1. Statements regarding defense counsel's failure to provide documents to expert witnesses.

Most of the statements with which Defendant now takes issue deal with the same topic—defense counsel's failure to provide Defendant's expert witnesses with information pertinent to the opinion rendered by the expert. Defendant lists these statements in his brief, Aplt's Br., at 29-30, and characterizes them as "attacks on opposing counsel," id. at 29. These statements are not attacks on counsel; rather, they are appropriate comments regarding the foundation of the testimony of Defendant's expert witnesses.[29]

As explained above, at pages 8 & 10 n.3, defense counsel made a practice in this case of providing Defendant's experts with only selected documents. As noted, Merryweather made the district court aware of this practice prior to trial, when she filed a motion in limine. During cross-examination of Defendant's experts, Merryweather's counsel asked numerous questions of them regarding the information upon which they had based their opinions. Vol. 6, at 230-32 (Dr. Weight); Vol. 7, at 31-33 (Dr. Knorpp), 112-16 (Dr. France). These experts all testified that they had been given only selected documents, and that their opinions were based upon the documents they had seen and the information they had been given. Id.

[29] It is important to note that these remarks were made in the context of noting the jury's responsibility as judges of the weight of the evidence, credibility of the witnesses, and judges of the facts of the case. Vol. 8, at 11 (discussing jury instruction #5).

During closing argument, counsel pointed out to the jury that these experts had not been given complete sets of information. For instance, Dr. France was not told, at the time he issued his opinion, that Defendant had testified that he had been traveling at 25 miles per hour. Vol. 7, at 140. Counsel commented on this at closing argument, as a way of impugning the foundation of Defendant's expert testimony and opinions.

These statements were entirely proper. It is certainly permissible to ask an expert witness what documents he has seen, and then to comment to the jury about it when the expert testifies that he has not seen critical documents.[30]

In any event, Defendant did not object to any of these statements. See Vol. 8, at 13, 86-89. Therefore, the district court's decision to let them stand must be reviewed under the plain error standard. See Utah R. Evid. 103(d). It is apparent that the district court did not commit plain error in the admission of these statements.

2. Statements regarding the fees received by Defendant's experts.

Next, Defendant takes issue with counsel's statement to the jury during closing argument that Defendant's expert witnesses do most of their work for defendants (and not for plaintiffs), and each receive over $100,000 per year testifying for defendants and defense counsel. Such statements are entirely proper. "Fee arrangements may bear on the impartiality and, therefore, the credibility of an expert witness. Hence, an expert

[30] The case law Defendant cites in support of his argument is completely inapposite. Those cases prohibit statements "not justified by the record" and "without supporting evidence," see, e.g., Missouri K.T.R. Co. v. Ridgway, 191 F.2d 363, 369 (8th Cir. 1951), and statements made "for the apparent purpose of inflaming the jury," see State v. Begishe, 937 P.2d 527, 529 n.1 (Utah Ct. App. 1997). Counsel's statements were entirely supported by the record, were the previous subject of a motion in limine, and were made to point out weaknesses in Defendant's expert testimony, not to inflame the jury. It would be hard to imagine a rule that prevented counsel from commenting on the foundation (or lack thereof) for the other side's expert testimony.

witness's fee is a proper subject on which to comment to the jury." See Burke v. State, 484 A.2d 490, 499 (Del. 1984); see also Guzeldere v. Wallin, 593 N.E.2d 629, 637-38 (Ill. Ct. App. 1992); Duckett v. State, 919 P.2d 7, 19 (Okla. Crim. App. 1995). Indeed, a statement that an expert is "a hired gun" who "does 90 percent of his work for plaintiffs" was deemed an admissible statement that "did not exceed the bounds of zealous argument." Dawson v. MetroHealth Ctr., 662 N.E.2d 1123, 1124-25 (Ohio Ct. App. 1995).[31]

These statements, fully supported by the evidence, e.g., Vol. 6, at 219-24 (Dr. Weight); Vol. 7, at 34-36 (Dr. Knorpp), were made without objection from Defendant. Vol. 8, at 92. The district court did not commit plain error by allowing these statements.

3. Statements regarding counsel's opinions.

Finally, Defendant takes issue with several statements made during closing argument that Defendant now characterizes as "personal opinions of plaintiff's counsel." Aplt's Br., at 31-32, 34. First, Defendant argues that counsel "personally opined as to what [Defendant's] testimony would have been had he been present." Id. at 31. This statement is so specious as to warrant only a brief response: Merryweather read Defendant's deposition transcript into the record. Vol. 2, at 5-42. Counsel's argument regarding Defendant's testimony was not opinion; it was a reference to actual record evidence.

Second, Defendant takes issue with one other statement (and the only one he objected to at the time): counsel's statement that "I don't like these guys." Vol. 8, at 95.

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[31] The cases cited by Defendant do not advance his argument. Those cases involved situations where there was no evidence in the record as to how much the experts had been paid. See Commonwealth v. Shelley, 373 N.E.2d 951, 954 (Mass. 1978). The court found error because the prosecutor's remarks "were based on facts not in evidence." Id. In this case, by contrast, Defendant's experts had already testified that they did 85% to 90% of their work for defendants, and that they made roughly $100,000.00 per year testifying. See, e.g., Vol. 6, at 219-24 (Dr. Weight); Vol. 7, at 34-36 (Dr. Knorpp).

Defendant objected, and the court called for a sidebar conference. Id. After the sidebar, and after agreeing to do so with the court, Merryweather's counsel instructed the jury to "disregard my personal feelings and my history with these guys." Id. Defendant did not request further relief, such as an additional curative instruction or some other remedy.[32] The court did not abuse its discretion in the manner in which it handled that situation.[33]

In short, the district court simply did not abuse its discretion in handling the allegedly "prejudicial" statements of counsel. Most of these statements were made without objection, and where an objection was lodged, it was granted and the statement remedied. There is simply no error here.

VII. IF THE DISTRICT COURT COMMITTED ERROR, ANY SUCH ERROR WAS HARMLESS

As discussed above, the district court did not commit error, and did not abuse its discretion, in its evidentiary rulings during the trial. However, even if one were to assume, *arguendo*, that the court committed error in this case, any such error was harmless.

Utah R. Civ. P. 61 states that

> [n]o error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to

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[32] Defendant appears to suggest, in his brief, that counsel's statements violated the Utah Rules of Professional Conduct. Aplt's Br., at 31. If Defendant or defense counsel feels that this is the case, and that any such violation was not cured by the instruction given after the sidebar conference, their remedy is to file a complaint with the Utah State Bar.

[33] Defendant also argues that counsel's statement that "[i]t makes me crazy" was an improper and prejudicial statement of opinion. Aplt's Br., at 30-31. As discussed above, this statement was made in the context of discussing defense counsel's practice of giving Defendant's experts only selected information. Id. at 30. It is proper to comment on the foundation for an opposing expert's testimony. Again, however, Defendant did not object to this statement, Vol. 8, at 87, and its admission was not plain error.

the court inconsistent with substantial justice.

Substantial justice is affected "if, viewing the evidence as a whole, there is a reasonable likelihood a different result would have been reached absent the error." Erickson v. Wasatch Manor, Inc., 802 P.2d 1323, 1325 (Utah Ct. App. 1990); see Crookston v. Fire Ins. Exch., 817 P.2d 789, 796 (Utah 1991) ("an error is harmful only if the likelihood of a different outcome is sufficiently high as to undermine our confidence in the verdict").

In this case, any error committed by the district court (if any) was harmless. As argued above, none of the decisions made by the district court during the course of the trial were abuses of the district court's wide discretion. Even assuming, however, that one or more of them were, any such error was harmless because the likelihood that the jury would have reached a different outcome in the absence of any error is so low that confidence in the jury's verdict should not be undermined.

A key inquiry in the harmless error analysis is whether there would have been sufficient evidence to sustain the jury's verdict even without erroneously admitted evidence. E.g., State v. Adams, 2000 UT 42, ¶23, 5 P.3d 642 (holding that the erroneous admission of certain testimony was harmless because "other persuasive evidence supports" the verdict). In this case, even if, for instance, Mr. Cottle had not been allowed to present 5 minutes of rebuttal, or if the trial court had informed the jury from the beginning as to Defendant's church service overseas, or if Merryweather's counsel had not made any "accountability" reference in opening statement, the jury's verdict would not have been any different. The court, after careful scrutiny, determined that "there was evidence presented to the jury that supports the verdict." See R. at 1137. This would still be true even if one or more of the district court's evidentiary rulings had been different.

In short, there is no basis for assuming that the jury's verdict would have been any different had one or more of the rulings come out the other way. The jury spent eight days of their lives considering the evidence presented, and rendered a verdict wholly supported by the evidence presented. The district court, after two rounds of briefing and admittedly careful scrutiny, concluded that the jury's verdict was sound. There is no reason for this Court's confidence in the jury's verdict to be undermined in any way. If the district court committed error, that error was harmless.

CONCLUSION

The fundamental issue in this case is, as the district court found, that "there was evidence presented to the jury that supports the verdict." R. at 1137. The jury sat for eight days, heard the testimony, weighed the evidence, and rendered a verdict based on that evidence. The district court, "[a]fter considerable reflection" during the new trial motion, and after a diligent "search[] for evidence of passion and prejudice," and even after stating that it "would not hesitate to grant a new trial if it could, in good conscience, say that there was a part of the verdict that did not have evidentiary support," upheld the jury's verdict. Id. Neither this ruling, nor any of the district court's other rulings, constituted an abuse of discretion. The judgment of the trial court should be affirmed.

DATED this 4th day of December, 2001.

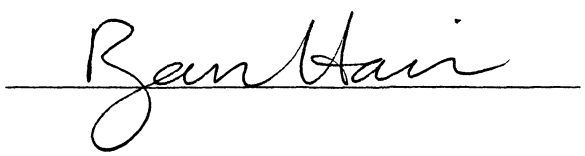
By _____
Ryan M. Harris
JONES, WALDO, HOLBROOK & McDONOUGH

Lynn C. Harris
HARRIS & CARTER
Attorneys for Plaintiff Rhonda Merryweather

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of December, 2001, I caused to be sent, via first-class U.S. Mail, postage prepaid, two copies of the foregoing **BRIEF OF APPELLEE** to the following:

R. Phil Ivie
David N. Mortensen
IVIE & YOUNG
226 West 2230 North, Suite 120
Provo, UT 84606



ADDENDUM

Tab A

IN THE FIRST JUDICIAL DISTRICT COURT

BOX ELDER COUNTY, STATE OF UTAH

RHONDA MERRYWEATHER,
Plaintiff,
vs.
CARSON CALLISTER,
Defendant.

Case No. 980100391
Transcript of Videotape.

Excerpted Transcript of Motion Hearing.
Honorable Ben H. Hadfield presiding.
First District Court Courthouse
Brigham City, Utah
March 1, 2001

* * *

APPEARANCES:

For the Plaintiff: LYNN C. HARRIS
Attorney at Law

For the Defendant: R. PHIL IVIE
Attorney at Law

RODNEY M. FELSHAW
Registered Professional Reporter
First District Court
P. O. Box 873
Brigham City, UT 84302-0873

(Proceedings to this point not transcribed.)

MR. IVIE: Let's switch quickly to the issue of the rebuttal witness. The last witness the jury heard was the plaintiff's friend from the hospital, Jeff Cottle. He was called as a rebuttal witness by the plaintiff.

The sole purpose for his testimony was to leave the jury with the impression that the defendant's medical witness was a liar. That was very simply it. Mr. Cottle was not asked one question to refute testimony given by the witness in the defendant's case in chief. It is clear from the case law that this is nothing but a strong man argument that is not what rebuttal is for. You don't call a rebuttal witness to rebut evidence that you yourself put on. Rebuttal is to refute the opponent's testimony, not testimony which a party himself elicits.

We cited to Randall versus Allen which defined rebuttal evidence as evidence tending to refute, modify, explain or otherwise minimize or nullify the effect of the opponent's evidence. The opponent's evidence.

We cited Astle versus Clark, which provided that the purpose of rebuttal evidence is not merely to contradict or corroborate evidence already presented, but to respond to new points of evidence first introduced by the opposing party. By the opposing party.

We also cited to a Tenth Circuit decision which I think

was particularly on point. There, in Kotch Industries, Kotch versus Kotch Industries, they stated, "Further, even if Markel had disputed Hall's testimony, the plaintiff's attorney intentionally elicited such testimony." Just as Mr. Harris did in his cross-examination of Dr. Knorpp. "When an attorney conducting cross-examination affirmatively draws out specific testimony, as occurred here, the district court does not abuse its discretion by disallowing rebuttal to that testimony."

Well, in light of the clear law on the issue, the plaintiff retreats to an argument that he was refuting evidence presented in our case in chief, because in the report of Dr. Knorpp, which is offered in evidence, there is a single comment. It's not commented on in his oral testimony, but it is in the report, that he did have a conversation with Mr. Cottle.

Well, was it proper rebuttal because that was in there? Of course not. If he was to rebut that statement, he would call a witness to say no, I didn't have a conversation with Dr. Knorpp. He didn't talk about the content of the conversation in that report. Nothing of the questioning in the rebuttal intended to go to that limited comment. It all was intended to go to evidence which Mr. Harris elicited himself and in what really was an attempt of character assassination on Dr. Knorpp. That is not the type of use for

proper rebuttal testimony.

Finally, we would indicate that this type of extrinsic evidence is improper impeachment under Rule 608 of the Rules of Evidence. Subsection B states, "Specific instances of the conduct of a witness for the purpose of attacking or supporting the witness's credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence." So not only was it improper rebuttal, but it should not have been used to impeach Dr. Knorpp because it was extrinsic evidence.

THE COURT: Let me ask you on that same rule, going down to subsection C, though, isn't it certainly possible to argue that if Dr. Knorpp in fact had made the statements that were claimed, that that shows bias or prejudice on the part of the witness?

MR. IVIE: Yes, I think that could be argued, Your Honor. But the fact remains that it was evidence that he himself elicited, the plaintiff. So I do maintain that it's improper rebuttal.

Going to the final point, the improper statements of counsel.

(Hearing continued, not transcribed.)

CERTIFICATE

THIS IS TO CERTIFY that the videotaped hearing was transcribed by me, Rodney M. Felshaw, a Certified Court Reporter and Certified Court Tape Transcriber in and for the State of Utah, residing at Brigham City, Utah.

That a full, true and correct transcription of the hearing, to the best of my ability, is set forth in the pages numbered 2 to 4, inclusive.

I further certify that the original transcript was filed with the Court Clerk, First District Court, Box Elder County, Brigham City, Utah.

I also certify that I am not associated with any of the parties to said matter and that I am not interested in the event thereof.

Witness my hand this 15th day of November, 2001.

Rodney M. Felshaw

Rodney M. Felshaw, C.S.R., R.P.R.